

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) reconsideration decision dated March 15, 2023. The Ministry found that the Appellant did not meet three of the five requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (the Act) for designation as a person with disabilities (PWD).

The Ministry found that the Appellant met the age requirement and had an impairment which was likely to continue for at least two years.

However, it was not satisfied that the evidence establishes that:

- The Appellant has a severe physical or mental impairment;
- The Appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- As a result of these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The Ministry also found the Appellant was not one of the prescribed classes of persons eligible for PWD on alternative grounds. As there was no information or argument on this point, the Panel considers it not to be an issue in this appeal.

Part D – Relevant Legislation

The Act, Section 2

Employment and Assistance for Persons with Disabilities Regulation, Section 2

Employment and Assistance Act, Section 22(4)

The relevant legislation is provided in the Appendix.

Part E – Summary of Facts

The evidence before the Ministry at the time of the reconsideration decision included the PWD Application comprising:

- A self report, signed by the Appellant on November 10, 2022;
- A medical report, dated December 8, 2022, and completed by the Appellant’s General Practitioner (GP) who has known the Appellant for more than 15 years and who has not indicated how many times they have seen the Appellant in the past year; and,
- An assessor report, signed by a Chiropractor (the Chiropractor) on December 12, 2022.

The Panel notes that the following sections of the assessor report appear to have been completed by someone other than the Chiropractor:

Section A – Applicant Information

Section B – Living Environment

Section C – Mental or Physical Impairment

Section D – Daily Living Activities

Section E – Assistance Provided for Applicant

The evidence available to the Ministry at the time of the reconsideration decision also included a request for reconsideration form signed by the Appellant on February 28, 2023. In the request for reconsideration the Appellant gives the reasons why she is asking the Ministry to reconsider its decision. Those reasons are detailed in the appropriate sections of the discussion below.

Also included in the Appeal documents is:

- A consultation report, dated May 13, 2022 and completed by a Rheumatologist;
- A magnetic resonance imaging (MRI) report, dated April 7, 2022 (the April 7, 2022 MRI Report);
- Two additional MRI reports, one dated May 27, 2021 (the May 27, 2021 MRI Report) and the other dated October 19, 2021 (the October 19, 2022 MRI Report); and,
- A static graphic report prepared by the Chiropractor on August 16, 2021.

Information contained in the consultation report, the three MRI reports and the static graphic report is provided in the appropriate sections of the discussion below.

Diagnoses

In the medical report, the GP diagnoses the Appellant with a mood disorder, cervical arthrosis, and fibromyalgia. In the consultation report, the Rheumatologist says that the Appellant’s pains

are "*likely from fibromyalgia*". In the assessor report, the Chiropractor writes that the Appellant has DDD (degenerative disc disease), CS (cervical stenosis), and TOS (thoracic outlet syndrome).

Severe Physical Impairment

In the medical report, under Health History, the GP wrote "*See patient's reports*", apparently referring to the consultation report, the April 7, 2022 MRI Report, the May 27, 2021 MRI Report, and the October 19, 2021 MRI Report.

With respect to functional skills, the GP indicates that the Appellant can walk more than 4 blocks unaided on a flat surface, climb more than 5 steps unaided, can do no lifting, and can remain seated for less than 1 hour.

In the assessor report, the person completing the form indicates that the Appellant is independent with the activities of walking indoors and outdoors and standing, requires continuous assistance from another person or is unable to climb stairs, and is unable to lift, carry or hold.

In the self report, the Appellant writes that she lives with constant nerve pain from fibromyalgia. She says that she gets severe pain that radiates through her body and causes her to vomit, and that she has bone spurs that cause her extreme neck pain. She says that she has to see a chiropractor every week to be able to move for the week, adding "*my fibromyalgia constantly attacks my pancreas and digestive tract and I constantly have to go on a liquid diet. My neck injury leaves me open and available to get bulging discs due to the pressure the injury is causing on my musculoskeletal frame. I spent 2 years going to physio, which will no longer touch my neck due to the full reversal of the cervical spine ... My legs get nerve pain and try to collapse on me*". The Appellant says that any kind of frequent neck turning, heavy lifting, or frequent arm movements cause pinching in her neck and extreme headaches, and that "*looking down for long periods of time causes me to want to faint*". She also says that she is unable to hold or carry her autistic child, and that she has had to cancel plans involving her other child because it hurts too much to move.

In the request for reconsideration, the Appellant argues that "*Fibromyalgia is recognized as a disability all over Canada*". She states that the osteoarthritis in her neck "*gets worse by the day*", and that she has a bone protruding from her neck vertebrae "*that indents the outer part of (my) spinal cord which will eventually paralyze me*". The Appellant also says that her GP has "*medically abandoned*" her and as a result she no longer has medical care to treat her fibromyalgia. She says that, while she is able to climb more than 5 steps at a time unaided, when she has to climb the 20 stairs at work to get to the staff bathroom "*I end up stopping half way up and vomiting from pain by the time I get to the top*".

In the consultation report, the Rheumatologist says the Appellant has ongoing pain in the lower neck which migrates to her abdomen, knee and back, adding "*The X-rays and bloodwork that I ordered did not reveal an autoimmune rheumatologic condition causing (the Appellant's) pain. I*

therefore told (the Appellant) her pains are likely from fibromyalgia." The Rheumatologist also concluded that the Appellant does not have an inflammatory cause for her pains and encouraged her to stay physically active and work on her sleep hygiene.

The April 7, 2022 MRI Report indicates that the Appellant's "*cervical spine alignment is maintained. Vertebral body and disc heights are preserved. Marrow signal is within normal limits*". The report also found "*no significant spinal or neural foraminal stenosis ... no cord signal abnormality identified*".

The May 27, 2021 MRI Report says, in part, "*Straightening of the normal cervical lordosis is present secondary to muscle spasm or postural factors. The vertebral bodies, intervertebral discs and posterior elements are unremarkable. The neural foramina are clear. There was no cervical rib.*"

The October 19, 2021 MRI Report finds that "*There is mild reversal of the cervical lordosis. No focal malalignment is demonstrated. Vertebral body and disc heights are maintained. There is no acute or aggressive osseous abnormality. There is no foraminal stenosis. No prevertebral soft tissue swelling is seen. The lung apices are clear.*"

The results of the static graphic report indicate high muscle tension in 10 sites (C2, C4, C6, T3, T5, T7, T11, L1, L3 and L5), moderately high muscle tension in 4 sites (C4, T1, T9 and T11), and normal muscle tension in 1 site. No below normal sites are identified.

Severe Mental Impairment

In the medical report, the GP says there are four significant deficits among twelve listed areas of cognitive and emotional functioning (i.e. memory, emotional disturbance, motivation, and attention). The GP also adds the comment "*Chronic conditions Poor response to conservative (medication) & physical therapy*". The GP has also indicated that the Appellant is restricted in social functioning, adding the comment "*avoiding social contacts*".

In the assessor report, the person completing the form indicates that the Appellant's abilities are good in the listed areas of speaking and writing, and poor in reading ability (adding the comment "*confusion*") and hearing ("*confusion, comprehension*").

In the assessor report, the person completing the form has also indicated three major impacts in the area of consciousness, emotion and attention/concentration; four moderate impacts (bodily functions, motor activity, language, and other neuropsychological problems); six minimal impacts (motivation, executive functioning, memory, consciousness, impulse control, insight and judgment, and other emotional or mental problems); and no impact on psychotic symptoms. No additional comments are made in the space provided.

With respect to social functioning, the person completing the form indicates in the assessor report (with comments in *italics*) that the Appellant is independent in making appropriate social decisions and securing assistance from others; requires periodic assistance from another person

in interacting appropriately with others; and requires continuous assistance or is unable to develop and maintain relationships (*due to PTSD*) or to deal appropriately with unexpected demands. The person completing the form also indicates that the Appellant has very disruptive functioning with her immediate and extended social networks.

In the self report and the request for reconsideration, the Appellant says that having to visit the chiropractor every week has resulted in great financial strain that has produced extreme stress, causing her body to shut down, and that the pain from her fibromyalgia has resulted in extreme anxiety and depression. She also says that she gets extreme mood swings, and that "*brain fog has caused me to forget things like my own name*", and that trying to find a new doctor is stressful to the point that she thinks about ending her life at times.

Restrictions in the Ability to Perform DLA

In the medical report, the GP indicates that the Appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA. The GP reports that the Appellant is periodically restricted in basic housekeeping and is continuously restricted with daily shopping and mobility outside the home.

When asked to provide additional comments regarding the degree of restriction the GP writes "moderate".

In the assessor report, the person completing the form indicates that the Appellant is independent in performing most DLA tasks. The exceptions are as follows:

- **Personal Care** – The Appellant requires periodic assistance from another person with grooming and transferring on and off a chair. While it has not been indicated whether the Appellant needs any assistance with regulating her diet, the comment "*extreme dietary issues*" has been added;
- **Basic Housekeeping** – The Appellant requires continuous assistance from another person or is unable to do laundry, and requires periodic assistance from another person for all other basic housekeeping tasks;
- **Shopping** – The Appellant requires periodic assistance from another person in reading prices and labels, and is unable to carry purchases home;
- **Meals** – The Appellant takes significantly longer with meal planning ("*extreme dietary issues*"), food preparation and cooking;
- **Medications** – The Appellant needs periodic assistance from another person with taking medications as directed; and,
- **Transportation** – The Appellant needs periodic assistance from another person with getting in and out of a vehicle ("*depends on vehicle*").

No additional comments or explanations are made in the spaces provided.

In the request for reconsideration, the Appellant writes that she "*(goes) through life barely eating as I have developed so many food issues due to this condition and cannot afford to feed myself let alone my family*". She also says that she has had to give up driving a vehicle and that sometimes the nerve pain in her legs is so bad that she "*cannot get out of bed for days*".

Need for Help

In the medical report the GP indicates that the Appellant does not require any prostheses or aids for her impairment.

In the assessor report, the person who completed the form indicates that the Appellant lives with her family and that she gets help with DLA from her husband. The person completing the form also indicates that the Appellant uses a cane and braces to help compensate for her impairment, but does not have an assistance animal.

Additional Information Submitted after Reconsideration

Section 22(4) of the EAA says that a panel may consider evidence that is not part of the record that the panel considers to be reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Once a panel has determined which additional evidence, if any, is admitted under EAA Section 22(4), instead of asking whether the decision under appeal was reasonable at the time it was made, a panel must determine whether the decision under appeal was reasonable based the requirements set out in the legislation and on all admissible evidence.

In the section of the Notice of Appeal (NOA) asking why the Appellant disagrees with the Ministry's reconsideration decision, the Appellant has written "*I have fibromyalgia and osteoporosis in my neck. I suffer from extreme mood disorders due to my chronic pain. I am not to do lifting and since the beginning of the application my neck has gotten worse. Extreme pain comes from just stress.*"

Evidence Presented at the Hearing

At the hearing, the Appellant said that her GP had abandoned her. In response to a question from the Ministry about whether the Appellant was present when the GP completed the medical report, the Appellant said that she was not, and that the GP did not fill out the medical report properly. She stated that the GP had refused to see her in their office because of COVID, even though COVID "*was over*", and that she waited for two weeks after asking the GP to fill out the medical report, and when she checked with the GP's office she was told that the GP had taken the medical report home with them. The GP was about to retire and she was told by their office that the GP wouldn't be returning to their office for two weeks, and that "*a month passed with no paperwork*". The Appellant also said that when she finally saw the medical report she noticed several problems, including that the GP had referred to one of her ailments as "*neck*"

decompression", which she thought was not an accurate description of her condition, and that they had written in the medical report "*see reports*" but that there were no reports attached.

The Appellant also said that she now has a new doctor who she started seeing two weeks ago. The Appellant's new doctor told her that she had osteoarthritis, not osteoporosis, that her neck pain aggravates her fibromyalgia, and that the Appellant was "*not coming back from this*"; which the Appellant said indicated that there was no cure for her fibromyalgia. The Appellant said she was told by her new doctor that there was no chance for her to have surgery to address her ailments until she was in her 50's. Regarding medication, the Appellant said that the only option was pain killers and that she didn't want to take "*hard core painkillers*". She said that she does take over-the-counter anti-inflammatories sometimes which gave her some relief for about an hour.

The Appellant talked about several of the impairments she had described in the self report and the request for reconsideration. She also said that she has been to the hospital many times, and is told that she is just imagining things. She said that it has gotten to the point where she asks herself "*Do I even want to keep fighting anymore*". The Appellant said that her bone spurs could puncture her spine, which might be life threatening.

Regarding her employment, the Appellant said that she doesn't want to work and would rather focus on trying to heal. She said that she struggles with going into the office and was once sent home because she vomited at work due to the pain from her fibromyalgia. She also said that her employer has reduced her work hours due to her impairment, which makes her feel like she is being "*punished for being disabled*". She explained that she needs to keep working for financial reasons, adding that her doctor told her to take physiotherapy, which she has been doing on a regular basis, but it's very expensive and as a result "*her credit cards are maxed out*". The Appellant also said that she can't do the job she's doing now and doesn't have money for retraining.

In terms of the impact on her DLA, the Appellant said that the fibromyalgia pain often "*keeps her in bed for days*". When asked by the Ministry to describe an average day, the Appellant said that sometimes she is unable to get out of bed in the morning, and the length of time she is confined to her bed depends on how long it takes for the nerve pain to end. She explained that she is sometimes in such extreme pain that she can't get dressed, and she could be in bed for "*hours, days or weeks*". When asked to indicate on average, how often she is confined to her bed, she said 4 to 5 times per month. The Appellant also said that she has had to give up driving because she can no longer do shoulder checks, and has to rely on public transit, or rides from family and friends. She said that she can walk to the store and the laundromat (she doesn't have a washer or dryer), both of which are a few blocks from her home, but she must be accompanied because she needs help. When asked by the Panel who helps her with these activities, the Appellant said she has to rely on her partner or her eldest child when she goes shopping or to the laundromat because she can't carry or lift heavy objects and needs to have them do that for her. The Appellant also said that her mother sometimes "*drives her around*".

She said that she can do some cooking, but is unable to do any meal preparation activities or any housekeeping involving heavy lifting.

When asked by the Panel if she knew who completed Sections A through E of the assessor report, the Appellant said that it was the receptionist in the Chiropractor's office. The Appellant added that the Chiropractor already knows about all the Appellant's problems, and that the Chiropractor would have provided the receptionist with the detailed information that appears in those sections of the form, and may have been sitting with the receptionist when they filled out those sections of the assessor report.

In response to another question from the Panel about the Appellant's reliance on a cane and braces, as indicated in the assessor report, the Appellant said that she must use a cane when her fibromyalgia attacks a nerve behind her kneecap as she is unable to walk unassisted. She said this happens once every ten days or so. Regarding a brace, she explained that she wears a thoracic brace every day, especially at work, because it keeps her thoracic spine from moving and sliding. She said she also uses a back straightener.

At the hearing, the Ministry relied on its reconsideration decision, stressing that there were a number of inconsistencies between the information provided in the medical report and the assessor report, particularly with respect to the nature and severity of the Appellant's impairments.

In response to a question from the Panel, the Ministry said that it had not consulted with any additional medical practitioners regarding the severity of the Appellant's impairments as expressed by the GP in the medical report, and that it had based its reconsideration decision solely on the evidence provided in the Appellant's PWD application.

In response to another question from the Panel regarding the persons with persistent multiple barriers to employment designation (PPMB), which was referred to in the reconsideration decision, the Ministry provided further details on the application process. The Ministry said that the PPMB application form was six pages, three of which had to be completed by a medical professional and that the time required by the Ministry to assess an application was ten business days, considerably shorter than the time required for the processing of a PWD application. The Ministry also said an individual could not be considered for both the PPMB and the PWD designation, but if approved for the PPMB designation additional income assistance benefits might be available.

Admissibility of New Evidence

New evidence contained in the NOA is the Appellant's contention that she suffers from osteoporosis. The Panel notes that neither the GP, the Rheumatologist nor the Chiropractor have diagnosed the Appellant with this disease.

The following new evidence was presented verbally by the Appellant at the hearing:

- Details regarding the retirement of the GP and the Appellant's new doctor;
- Information about the revised diagnoses provided by the Appellant's new doctor; and,
- More detailed information about the frequency and duration of the Appellant's impairments, their impact on her DLA, and who helps her with them.

The Panel admits all of the new evidence provided in the NOA and at the hearing as it might reasonably be required for a full and fair disclosure of all matters related to the decision under appeal.

Part F – Reasons for Panel Decision

The issue under appeal is whether the Ministry's reconsideration decision, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant. In other words, based on all the admissible evidence, was it reasonable for the Ministry to determine that the Appellant does not have a severe mental or physical impairment, and that the Appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods? Was it reasonable for the Ministry to determine that because of the absence of any direct and significant restrictions it could not be determined that the Appellant requires the help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA?

ANALYSIS**Severity of Impairment**

The term "*impairment*" is not defined in the Act. The Cambridge Dictionary defines "*impairment*" in the medical context to be "*a medical condition which results in restrictions to a person's ability to function independently or effectively*". "*Impairment*" is defined in the medical report and the assessor report sections of the PWD application form to be "*a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, appropriately or for a reasonable duration*". While the term is not defined in the legislation, the Panel finds that the Ministry's definition of "*impairment*" as set out in the medical report and the assessor report is a reasonable definition of the term for the purpose of partially assessing an applicant's eligibility for PWD designation.

In addition, a diagnosis of a severe impairment does not in itself determine PWD eligibility. Section 2(2) of the Act requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a medical practitioner or a nurse practitioner, it must both be likely to continue for at least two years [the Act Section 2(2)(a)], and, in the opinion of a prescribed professional, it must directly and significantly restrict a person's ability to perform DLA continuously or periodically for extended periods, resulting in the need for an assistive device, significant help or supervision, or an assistance animal in performing those activities [the Act Section 2(2)(b)]. In determining PWD eligibility, the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence of prescribed professionals – in this case the GP and the Chiropractor - regarding the length of time that the severe impairment is likely to continue, and the impact on DLA and the need for assistance.

The Ministry has determined both the duration of the impairment criterion and the Appellant's age criterion have been met and therefore they are not at issue in this appeal.

Physical Functioning

The Appellant's position is that she lives with constant nerve pain from fibromyalgia, and the pain is getting worse every day. She says that she gets severe pain that radiates through her body, and as a result she is unable to do any lifting or carrying. In addition, she has a bone protruding from her neck vertebrae that will eventually paralyze her.

The Ministry's position is that the assessments of the Appellant's mobility and physical ability as expressed by prescribed professionals are inconsistent regarding the Appellant's stair climbing ability and need for assistive devices, and that those assessments and the information provided by the Appellant in the self report are indicative of a moderate rather than a severe physical impairment.

Panel Decision

The question of whether an individual's physical impairment is severe depends on the degree to which their physical functioning is restricted by the impairment. The term "*severe*" is not specifically defined in the legislation. The Cambridge Dictionary defines "*severe*" as "*causing very great pain, difficulty, worry, damage, etc.; very serious*". The Ministry has developed two reports to assess the degree of severity of a physical impairment based on an applicant's physical functioning skills. These two reports (the medical report and the assessor report) must be completed by prescribed professionals, in this case the GP and the Chiropractor. To assist the Ministry in assessing the degree or severity of an individual's physical impairment, the medical report and assessor report ask the prescribed professional to indicate whether the applicant has any restrictions with several specific physical functions, and to explain the restrictions or provide comments to give more detail as to how the restrictions impact the applicant's physical capabilities.

The Panel notes that there are inconsistencies in the information provided by the prescribed professionals in the medical report and the assessor report. For example, as indicated by the Ministry in the reconsideration decision, in the medical report the GP says that the Appellant does not need any assistive devices, while in the assessor report the Chiropractor says that the Appellant routinely uses a cane and braces. At the hearing, the Appellant provided additional details about when and why she uses a cane and braces. However, the legislation requires that an assessment of the degree of restriction to an applicant's physical functioning be primarily based on the opinions of prescribed professionals, and in this case the information provided by the GP and the Chiropractor is not consistent.

Where asked in the medical report to provide additional comments on the Appellant's physical functioning skills, there are no additional comments provided by the GP to allow the Ministry to reasonably determine the severity of the Appellant's limitations. For example, in the assessor

report, the Chiropractor does not explain why they have indicated that the Appellant needs continuous assistance in climbing stairs, an assessment that is not consistent with the information provided by either the GP or the Appellant.

Where asked to provide additional comments regarding the degree of restriction the GP wrote "moderate" in the medical report. In addition, in the consultation report, the Panel notes that the Rheumatologist has written "*The X-rays and bloodwork that I ordered did not reveal an autoimmune rheumatologic condition causing (the Appellant's) pain*", and concludes that the Appellant does not have an inflammatory cause for her pains. The Rheumatologist also encourages the Appellant to stay physically active and work on her sleep hygiene.

Regarding other evidence in the Appeal materials, the April 7, 2022 MRI Report indicates that the Appellant's cervical spine alignment is maintained, her vertebral body and disc heights are preserved, and that her marrow signal is within normal limits. The report also found "*no significant spinal or neural foraminal stenosis ... no cord signal abnormality identified*". The May 27, 2021 MRI Report says, in part, "*Straightening of the normal cervical lordosis is present secondary to muscle spasm or postural factors. The vertebral bodies, intervertebral discs and posterior elements are unremarkable. The neural foramina are clear. There was no cervical rib.*" The October 19, 2021 MRI Report finds that "*There is mild reversal of the cervical lordosis. No focal malalignment is demonstrated. Vertebral body and disc heights are maintained. There is no acute or aggressive osseous abnormality. There is no foraminal stenosis. No prevertebral soft tissue swelling is seen. The lung apices are clear.*"

The Panel finds that the addition evidence summarized above also suggests that the Appellant's physical impairments might reasonably considered moderate, and that the available evidence reasonably supports the Ministry's determination that the Appellant does not have a severe physical impairment. As a result, the Panel finds that the Ministry's decision is a reasonable application of the evidence in the circumstances of the Appellant.

Mental Functioning

The Appellant's position is that frequent visits the chiropractor every week has resulted in great financial strain causing her extreme stress, and that pain from fibromyalgia causes her great anxiety and depression. She also says that she gets extreme mood swings, and that trying to find a new doctor is stressful to the point that she thinks about ending her life.

The Ministry's position is that the information provided by the GP and the Chiropractor in the medical report and the assessor report respectively indicates that the Appellant has some difficulties with emotion, concentration, motivation and memory, but the GP says that the Appellant's restrictions in these areas is moderate, which does not suggest a severe mental impairment.

Panel Decision

Although the legislation contains no formalized criteria to define what constitutes mild, moderate or severe cognitive deficits, prescribed professionals are required to indicate in the medical report and the assessor report the severity of a mental impairment by assessing the number of skill areas affected by the impairment, the severity of the deficits in psychological processes, and the degree of impairment in skill areas.

The Ministry mentioned that the GP has commented in the reconsideration decision that the Appellant's social functioning restrictions impact her mental functioning by causing her to avoid social contacts. In addition, the Ministry says in the reconsideration decision that the Chiropractor does not describe the support or supervision that the Appellant requires to help maintain her in the community, even though the Chiropractor has indicated that the Appellant has very disruptive functioning with both her immediate and extended social networks. The Panel finds that the Ministry reasonably determined that support or supervision would be required if an individual's social functioning was very disturbed.

The Panel notes that in the assessor report, the Chiropractor does not provide any comments that would inform the Ministry as to the degree to which the Appellant's mental impairment restricts or impacts her mental functioning, even though the form specifically asks the prescribed professional to explain the effect of those impairments in the comments space in that section of the form. In addition, while the Chiropractor has indicated that the Appellant needs continuous support in developing and maintaining relationships, the explanation given (*due to PTSD*) refers to a disability that has not been diagnosed by a medical or nurse practitioner.

The Panel finds that the Ministry's decision in the reconsideration decision that the Appellant does not have a *severe* mental impairment is reasonably supported by the evidence and is a reasonable application of the evidence in the circumstances of the Appellant.

Restrictions in the Ability to Perform DLA

The Appellant's position is that fibromyalgia pain frequently keeps her in bed for days, sometimes she is in such extreme pain that she can't get dressed, she has had to give up driving, and she has to be accompanied by a family member when she goes to the store and the laundromat because she is unable to lift or carry anything heavy.

The Ministry's position is that, while it is reasonable to expect that the Appellant would experience some restrictions in her ability to perform DLA given her medical history, there is not enough evidence to confirm that the Appellant's impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

In determining PWD eligibility, after assessing the severity of an impairment, the Ministry must consider how long the severe impairment is likely to last and the degree to which the ability to perform DLA is restricted and assistance in performing DLA is required. DLA are defined in

Section 2(1) of the EAPWDR and are also listed, in an expanded form and using different language, in the medical report and the assessor report. For example, the DLA of "*prepare own meals*" in EAPWDR Section 2(1) appears in the assessor report as "*meal planning*", "*food preparation*", "*cooking*" and "*safe storage of food*".

Section 2(2)(b) of the Act requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts their DLA, either continuously or periodically for extended periods. The term DLA appears in Section 2(2)(b) of the Act in the plural ("*daily living activities*"), which means that at least two of the activities listed in Section 2(1) must be significantly restricted for this legislative criterion to be met.

As mentioned previously, Section 2(2)(a) of the EAPWDR defines "*prescribed professional*" to include both a medical practitioner and a chiropractor. Therefore, the GP and the Chiropractor are considered prescribed professionals for the purpose of providing opinions regarding the nature of the Appellant's impairment and its impact on the performance of DLA. The term "*directly*" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. In addition, there is a component related to time or duration: the direct and significant restriction must be either continuous or periodic, and, if periodic, must be for extended periods.

In the medical report and the assessor report, prescribed professionals are instructed to check marked boxes and to provide additional explanations; for example, a description of the type and amount of assistance required and the frequency and duration of periodic restrictions.

The Ministry notes in the reconsideration decision that the GP does not explain what assistance is required with DLA in the medical report, and the Chiropractor does not describe the frequency and duration of any assistance required with specific DLA that are said by the Chiropractor to be periodically restricted (i.e. grooming, transfers, basic housekeeping, reading prices and labels while shopping, taking medication as needed and getting in and out of a vehicle).

The Panel notes that the Appellant described the frequency and duration of periodic restrictions for a few DLA at the hearing. An appellant's information can fill in gaps about frequency and duration if it is consistent with a prescribed professional's information. However, in this case the Appellant's information is either not consistent with the prescribed professionals information on DLA impacts and need for help, the information provided by the prescribed professionals is inconsistent, or there was no information provided by the prescribed professionals to indicate that periodic restrictions were for extended periods.

For example, in both the medical report and the assessor report, the prescribed professionals both said that the Appellant's restrictions in basic housework were periodic, but neither of them provided any information about the frequency and duration of those restrictions. As mentioned above, the fundamental basis for the analysis is the evidence of prescribed professionals regarding the impact on DLA and the need for assistance, so the Ministry would reasonably

require that prescribed professionals include that information in the medical and assessor reports. And regarding the Appellant's ability to perform activities involving personal hygiene and self care, the GP said she was independent, the Chiropractor said she was independent with most of her personal care activities, including dressing, while the Appellant said at the hearing that there were times that she was unable to get out of bed and dress herself.

Based on the evidence, the Panel finds that the Ministry's determination that there is insufficient evidence to confirm that the Appellant's DLA are, *in the opinion of a prescribed professional*, directly and significantly restricted as a result of a severe impairment, is reasonably supported by the evidence.

Help with DLA

The Appellant's position is that she requires the help of her family (her partner, eldest child and mother) in carrying and lifting when shopping, bringing purchases home from the store and in doing laundry.

The Ministry's position is that it has not been established that the Appellant's DLA are significantly restricted, and as a result, it cannot be determined that significant help is required from other persons.

Panel Decision

Help to perform one or more DLA is defined in EAPWD Section 2(3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(2)(b)(ii) of the Act says that the help a person requires must be *as a result of direct and significant restrictions in their ability to perform DLA*. In the reconsideration decision, the Ministry determined that the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion.

Given the requirements of the legislation, the Panel finds that the Ministry's conclusion that it could not be determined that the Appellant needs significant help from others because it has not been established that the Appellant's DLA are significantly restricted, is a reasonable application of the legislation in the circumstances of the Appellant.

Conclusion

Having reviewed and considered all the admissible evidence and relevant legislation, the Panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for the PWD designation under Section 2 of the Act, was reasonably supported by the available evidence and was a reasonable application of the legislation in the circumstances of

the Appellant. Therefore the Panel confirms the decision and the Appellant's appeal is not successful.

Appendix – Relevant Legislation

The criteria for being designated as a PWD are set out in Section 2 of the *Employment and Assistance for Persons with Disabilities Act* as follows:

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a

severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The Employment and Assistance for Persons with Disabilities Regulation provides as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following

activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

(ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner ...

The *Employment and Assistance Act* provides as follows:

Panels of the tribunal to conduct appeals

22(4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

APPEAL NUMBER 2023-0085

Part G – Order

The panel decision is: (Check one) Unanimous By Majority

The Panel Confirms the Ministry Decision Rescinds the Ministry Decision

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

Legislative Authority for the Decision:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

Section 24(2)(a) or Section 24(2)(b)

Part H – Signatures

Print Name

Simon Clews

Signature of Chair

Date (Year/Month/Day)

2023/04/15

Print Name

Peter Mennie

Signature of Member

Date (Year/Month/Day)

2023/04/15

Print Name

Inge Morrissey

Signature of Member

Date (Year/Month/Day)

2023/04/15